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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/803,864	03/18/2004	Christine J. Bodie	015-001	6541
53961	7590	08/08/2007		
FALKOWSKI PLLC P.O. BOX 650 NOVI, MI 48376-0650			EXAMINER SOOHOO, TONY GLEN	
			ART UNIT 1723	PAPER NUMBER
			MAIL DATE 08/08/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/803,864

Applicant(s)

BODIE ET AL.

Examiner

Tony G. Soohoo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 May 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-46 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-46 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Specification

1. The disclosure is objected to because of the following informalities: The specification should amended to state within the text of the specification that the weigh of "no more than approximately 15 pounds" is equal to "approximately 6.8 kilograms", so as to fully support the use of the equivalent structural terminology now used in the claim.

Appropriate correction is required.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claim 16 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The original specification fails to provide original basis that there no intervening sound barrier between the apparatus at a distance of 2 feet. The original specification fails to point out and provide basis that the device has no sound insulation, or the requirement of a particular motor type which provides a sound dampening.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 5-6,13, and 19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 13 recites a negative recitation of the operative motion "does not cause separation of contents" and thus unclear in what further positive structural element provides such an operation, since this appears to be a method step in operation in the apparatus claims.

Claim 16 is directed to the noise produced by the device and does not point out any structural element. Thereby the claim is narrative and fails to point out what structure is provide to produce (or attenuate) the recited generation of noise.

Claim 19 fails to provide proper antecedent basis for "said nail polish shaker". There is only a reference to an apparatus for shaking a container.

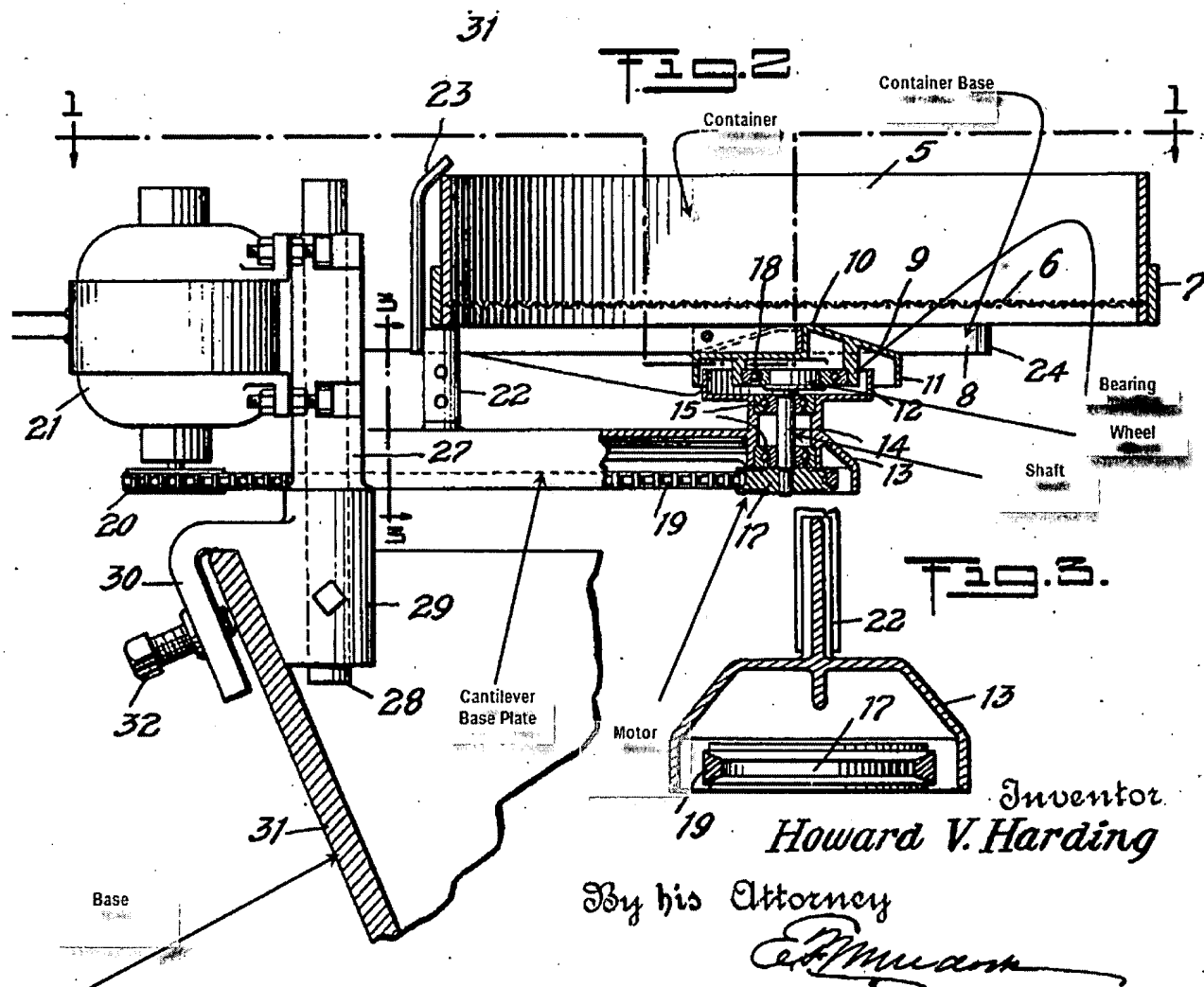
Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-10, 12-13, 23-24, 26-46 are rejected under 35 U.S.C. 102(b) as being anticipated by Harding 1866531.
8. The Harding reference discloses a base 31, a base plate 13 cantilevered at 30, motor mount and motor pulley 17, a shaft 14, a bearing 18, an eccentric wheel 16, a container base 7, 24, 10, 9, a container 5, retaining mechanism 32.
9. It is noted that it is deemed that upon the rotation of the shaft, it is deemed that the container base elements and base plate would inherently have some flexure. It is noted that there is also retainer 22 provide a change in the container base element motion caused by the wheel 16 rotation. With regards to claims 3-9, note that all materials have a flexure modulus which would allow a flexing (at least to a small or larger degree) of movement upward or downward. Also note that the container 5 maybe capable of holding additional containers and/or containers having nail polish or any other material if so desired.



10. Claims 1-13, 23-46 are rejected under 35 U.S.C. 102(b) as being anticipated by Davis 3159384.

The Davis reference discloses a base 17, a base plate 15 (fig 1), cantilevered to 16, motor mount and motor 14, a shaft 18 (figure 3-7), a bearing 22, an eccentric wheel 19, a container base 34 (figure 3-7), a container 40, 41, 42 (figure 4).

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It is noted that it is deemed that upon the rotation of the shaft 18, it is deemed that the container base elements and base plate 15 would inherently have some flexure. It is noted that there is also retainer spring band 49, 50 provide a change in the container base element motion caused by the wheel 16 rotation.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 14-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davis 3159384.

The Davis reference discloses all of the recited subject matter as defined within the scope of the claims with the exception of

the container being a 3 oz. Bottle(claims 14 and 18-19) ;

the mass of the device being less than 15 lbs (force) or 6.8 Kilograms (claims 15,

20);

the variable power source (claim 15);

the noise produced of the structure of the device (claim 16);

the retaining band is a rubber band, in contrast to a spring band of Davis (claim 17);

the power source being supplied by internal battery or by a cord (claims 21-22)

With regards to claims 14 and 18-19, also note that the containers maybe capable of holding any sized container, if so desired, so as to provide a optimum sample size for processing whereby the container size of 3 oz. is merely a change of size to the container. Furthermore, figure 6 that the Davis device may hold up nine containers. The prior art to Davis discloses the claimed invention except for particular volume (3 oz) of the container. Vessels of various sizes and capacity are common and old and well known in the art. In light of the knowledge of the common use of the public in which vessels of differing appropriate sizes are chosen in response to the desired amount to be processed, it would have been an obvious matter of design choice to provide a smaller or larger vessel capacity having the volume size of 3 oz. for reasons of providing a more appropriate sample size for processing, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

With regards to claims 15 and 20, it is noted that the device may physically weigh less than 15 lbs mass force or approximately 6.8 kilograms, if constructed with plastics or a lighter weight material so as to provide a more portable device, such a change

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would involve a mere optimization of the materials used to construct the device. Also the lighter the device, the device may be more portable and convenient for the user. Since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice (In re Leshin, 125 USPQ 416.), it is deemed that it would have been obvious to one of ordinary skill in the art to modify the materials used in the device to utilize plastic or lightweight material so as to provide a more portable device which is less than 6.8 kilograms such that it is more conveniently moved by the user as a portable device.

With regards to claim 15, also that it is common in the art of motor control that a device may be operated with varying electrical power thereby provide an adjustment of rotational speed, and such operational control by a rectifier or resistor is old and well known in motor controls and such a provision would provide a more precise vibration of the device. Accordingly, it is deemed that it would have been obvious to one of ordinary skill in the art to provide for the motor with a rectifier or resistor so as to provide a variable control for a more precise speed and operation control.

With regards to claim 16, also, the prior art apparatus device does not state or prohibit that it may be provided with insulation, or a quieter motor, such as an induction motor, or operated with a hand motor so as to provide a more quiet operation. Such uses of insulation, hand motors, induction motors are common and well known in the art motor drives and motor drive housings for the effect of noise reduction. Accordingly with such common knowledge of the use of insulation or quieter motors, it is deemed

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that it would have been obvious to one of ordinary skill in the art to substitute the motor or provide insulation to the housing so as to provide a more quieter operation so as not to annoy the user, or render hearing loss of the user for OSHA safety reasons.

With regards to claim 17, Official notice is given to the equivalence of a structure of a rubber band, and a spring band in which they are deemed as both functional structural equivalents of an elastic device. Accordingly, it is deemed that it would have been obvious to one of ordinary skill in the art to substitute for the spring band with a rubber band for economical and part supply efficiency reasons.

2144.06 Art Recognized Equivalence for the Same Purpose
COMBINING EQUIVALENTS KNOWN FOR THE SAME PURPOSE

"It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) (citations omitted) (Claims to a process of preparing a spray-dried detergent by mixing together two conventional spray-dried detergents were held to be prima facie obvious.). See also In re Crockett, 279 F.2d 274, 126 USPQ 186 (CCPA 1960) (Claims directed to a method and material for treating cast iron using a mixture comprising calcium carbide and magnesium oxide were held unpatentable over prior art disclosures that the aforementioned components individually promote the formation of a nodular structure in cast iron.); and Ex parte Quadranti, 25 USPQ2d 1071 (Bd. Pat. App. & Inter. 1992) (mixture of two known herbicides held prima facie obvious). But see In re Geiger, 815 F.2d 686, 2 USPQ2d 1276 (Fed. Cir. 1987) ("Based upon the prior art and the fact that each of the three components of the composition used in the claimed method is conventionally employed in the art for treating cooling water systems, the board held that it would have been prima facie obvious, within the meaning of 35 U.S.C. 103, to employ these components in combination for their known functions and to optimize the amount of each additive.... Appellant argues... hindsight reconstruction or at best,... obvious to try'.... We agree with appellant.").

SUBSTITUTING EQUIVALENTS KNOWN FOR THE SAME PURPOSE

In order to rely on equivalence as a rationale supporting an obviousness rejection, the equivalency must be recognized in the prior art, and cannot be based on applicant's disclosure or the mere fact that the components at issue are functional or mechanical equivalents. In re Ruff, 256 F.2d 590, 118 USPQ 340 (CCPA 1958) (The mere fact that components are claimed as members of a Markush group cannot be relied upon to establish the equivalency of these components. However, an applicant's expressed recognition of an art-recognized or obvious equivalent may be used to refute an argument that such equivalency does not exist.); In re Scott, 323 F.2d 1016, 139 USPQ 297 (CCPA 1963) (Claims were drawn to a hollow fiberglass shaft for archery and a process for the production thereof where the shaft differed from the prior art in the use of a paper tube as the core of the shaft as compared with the light wood or hardened foamed resin

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core of the prior art. The Board found the claimed invention would have been obvious, reasoning that the prior art foam core is the functional and mechanical equivalent of the claimed paper core. The court reversed, holding that components which are functionally or mechanically equivalent are not necessarily obvious in view of one another, and in this case, the use of a light wood or hardened foam resin core does not fairly suggest the use of a paper core.); *Smith v. Hayashi*, 209 USPQ 754 (Bd. of Pat. Inter. 1980) (The mere fact that phthalocyanine and selenium function as equivalent photoconductors in the claimed environment was not sufficient to establish that one would have been obvious over the other. However, there was evidence that both phthalocyanine and selenium were known photoconductors in the art of electrophotography. "This, in our view, presents strong evidence of obviousness in substituting one for the other in an electrophotographic environment as a photoconductor." 209 USPQ at 759.).

An express suggestion to substitute one equivalent component or process for another is not necessary to render such substitution obvious. In *re Fout*, 675 F.2d 297, 213 USPQ 532 (CCPA 1982).

With regards to claims 21-22, it is also noted that the power source motor 14 maybe connected to a external power source of a battery or line power. The features of a battery or power line (corded) operated devices are notoriously known in the art of power supplies, and such a change would be obvious for reasons of portability and convenience either in a household or outdoor environment.

Response to Arguments

13. Applicant's arguments filed 5/23/2007 have been fully considered but they are not persuasive.

14. Applicant has addressed solely the Harding 1866531 reference. Applicant argues:

IV. SECTION 102 REJECTIONS

Among other distinctions, the "tilting/flexing" motion is found in all Applicants' claims and is not disclosed by Harding. Paragraph [0002] of Background of highlights the problems associated with repeating the same motion over and over again on a mixture of multiple substances. As discussed, prior art devices act as a "centrifuge" and result in "separation of substances with different densities" such as nail polish.

In contrast to Applicants' Figure 6 and numerous references in Applicants' specification, no drawing or text in Harding discloses any tilting motion. The purpose of Harding is for the "riddling or sifting sand" (e.g. to separate sand from other solid objects in the sand). The purpose of sifting is to separate, while the purpose of Applicants' tilting motion is to prevent separation. The motion involved is distinct, and accordingly, Applicants' claims are distinct. Thus, none of Applicants' claims can be properly rejected pursuant to 35 USC 102.

As discussed above, the mass-based and noise-based limitations are not disclosed in Harding. The claims as originally filed and as amended include additional distinctions.

1.

15. Applicant's argument to the operation and motion is deemed persuasive.

Applicant's burden in pointing out the deficiencies of the applied Harding reference to that of the limitations of the instant claims has not been fully satisfied or persuasive by the argument that the Harding reference does disclose any tilting motion, or that the purpose of the Harding reference is for the "riddling or sifting sand". The office action of 01/23/2007 and the current rejection made above, in response to applicant's amendment has fully addressed, and identified the corresponding elements, features, and structural cooperation fully meeting the scope of the claimed limitations of the instant invention.

16. Applicant has not addressed, nor discussed the instant claimed invention's distinction over the applied prior art to Davis 3159384, see the Office action of 01/23/2007, section 3. In the absence of any argument, it appears that applicant has conceded that the claims do not define over the prior art to Davis 3159384.

Conclusion

17. Applicant has amended the claims to point out further structural elements, and provide positive recitation of structural elements to support a functional narrative operation. This has necessitated the change in the grounds of rejection from that of the anticipation of the claims by the prior art made in the previous office action.

18. THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

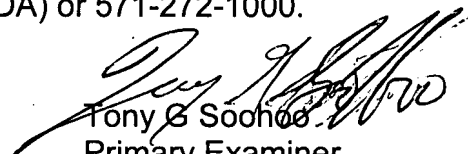
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tony G. Soohoo whose telephone number is (571) 272 1147. The examiner can normally be reached on 8AM-5PM, Tue-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David R. Sample can be reached on 571-272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


Tony G. Soohoo
Primary Examiner
Art Unit 1723